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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

WEST CENTRAL COOPERATIVE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT (and Appendices)

West Central Cooperative,
Petitioner

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QUESTIONS PRESENTED FOR REVIEW

1. Should the time frame for testing the judicially imposed requirement that a shareholder-producer be "currently patronizing" a cooperative under Internal Revenue Code Section 521 be restricted solely to business transacted within the twelve months constituting the tax year of the cooperative:

   (a) Even though the legislative intent and case law analysis would be aimed only at preventing the Section 521 tax exemption from flowing to investors, non-producers, and former producers having abandoned their cooperative as users, and

   (b) The only cited authority for the case imposing "current patronage" would look at a minimum of twenty-four months before assuming abandonment as a user has occurred, and

   (c) The farmer-patrons have at most one crop to sell, which because of poor harvest conditions, storage demands, or marketing strategy will be sold to the cooperative but the sale date of two successive crops may happen to straddle the twelve months comprising the cooperative's tax year, and

   (d) The cooperative, in an effort to avoid handling consumer type products which non-producers might be purchasing, deals only in

farm supplies which might only be purchased once each crop year by grain farmers, after fall harvest or before spring planting, with the purchase dates occasionally straddling the cooperative's twelve month tax year.

2. Should shareholder-patrons storing grain with West Central Cooperative during its tax year in question be excluded when counting the number of shareholder-producers who are currently patronizing West Central, where the only purpose and rationale for the requirement of on going business between member and cooperative is to make certain that the benefits of the tax exemption do not flow to investors, non-producers, or former producers having abandoned the cooperative as users.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 758 F.2d 1269 (8th Cir. 1985). The opinion of the District Court is reported at 607 F. Supp. 1 (N.D. Ia. 1984).

JURISDICTION

Judgment of the Court of Appeals was entered April 1, 1985. Petition for Rehearing was denied May 16, 1985. Jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Internal Revenue Code §521 provides as follows (with the pertinent language underlined):

(a) Exemption from tax.

A farmers' cooperative organization described in subsection (b)(1) shall be exempt from taxation under this subtitle except as otherwise provided in part I of subchapter T (sec. 1381

and following). Notwithstanding part I of subchapter T (sec. 1381 and following), such an organization shall be considered an organization exempt from income taxes for purposes of any law which refers to organizations exempt from income taxes.

(b) Applicable rules.

(1) Exempt farmers' cooperatives. The farmers' cooperatives exempt from taxation to the extent provided in subsection (a) are farmers', fruit growers', or like associations organized and operated on a cooperative basis (A) for the purpose of marketing the products of members or other producers, and turning back to them the proceeds of sales, less the necessary marketing expenses, on the basis of either the quantity or the value of the products furnished by them, or (B) for the purpose of purchasing supplies

and equipment for the use of members or other persons, and turning over such supplies and equipment to them at actual cost, plus necessary expenses. (2) Organizations having capital stock. Exemption shall not be denied any such association because it has capital stock, if the dividend rate of such stock is fixed at not to exceed the legal rate of interest in the State of incorporation or 8 percent per annum, whichever is greater, on the value of consideration for which the stock was issued, and if substantially all such stock (other than nonvoting preferred stock, the owners of which are not entitled or permitted to participate, directly or indirectly, in the profits of the association, upon dissolution or otherwise, beyond the fixed dividends) is owned by producers who market their products or

purchase their supplies and equipment through the association.

(3) Organizations maintaining reserve. Exemption shall not be denied any such association because there is accumulated and maintained by it a reserve required by State law or a reasonable reserve for any necessary purpose.

(4) Transactions with nonmembers. Exemptions shall not be denied such association which markets the products of nonmembers in an amount the value of which does not exceed the value of the products marketed for members, or which purchases supplies and equipment for nonmembers in an amount the value of which does not exceed the value of supplies and equipment purchased for members, provided the value of the purchases made

for persons who are neither members nor producers does not exceed 15 percent of the value of all its purchases.

(5) Business for the United States. Business done for the United States or any of its agencies shall be disregarded in determining the right to exemption under this section.

STATEMENT OF THE CASE

West Central Cooperative ("West Central") filed a Complaint seeking the refund of $57,459 additional taxes and interest assessed against it resulting from the revocation by the Internal Revenue Service ("IRS") of West Central's status as an exempt farmers' cooperative, effective for the tax year ending January 31, 1974 ("1974 year"). The basis for federal jurisdiction of the Trial Court was by virtue of 28 U.S.C. §1346(a)(1) and

26 U.S.C. § 7422(a).

West Central is a marketing and purchasing farmers' cooperative organization with its principal place of business in Ralston, Carroll County, Iowa. West Central purchases grain from its patrons, and sells farm supplies including livestock feed, fertilizer, herbicides, pesticides, and seed to its patrons. Up to and including the tax year in question, West Central never was involved in the sale of consumer type products, dealing strictly in farm supplies.

Although organized with capital stock, West Central has always referred to the holders of its common voting stock as members, and references herein to "members" refer to holders of common voting stock in West Central. In order to become a member, a patron would subscribe for one share of common stock, and pay for it through patronage dividends earned by

doing business with West Central. During the year 1974 West Central had outstanding 2,887 shares of voting stock. No member could own more than one share. The Articles of Incorporation of West Central provided that no fixed dividends could be paid on common stock (common stock or membership stock having the only vote), the only dividend to be paid on common stock dependent upon margins or net earnings of the cooperative, and allocation of any margins of the cooperative to its members in the form of patronage refunds or dividends, which are based upon the business done by the holder of such common stock with West Central. For the year 1974, the members' business constituted 93.4% of the total value of agricultural products marketed or handled by West Central. Of the total value of supplies and equipment sold by West Central for its tax year 1974, 98.5% was purchased by members.

West Central introduced evidence showing its agreement with the positions subsequently adopted by the Trial Court and Eighth Circuit that there are legitimate concerns as to who is receiving the benefits of the tax exempt status of a cooperative if member-shareholders cease to patronize it. As explained by Dr. James Baarda, of the Cooperative Service Division of the United States Department of Agriculture, witness for West Central, if a member has abandoned the cooperative and has no desire to use it, then such member might vote in an attempt to make the cooperative operate in a different fashion with regard to pricing or redemption of stock, that member at that point making decisions based upon his position as an investor rather than upon the maximum amount of benefit that can be given to a producer. Extended periods of non-use serve as an indication that the member has

abandoned the use of the cooperative.

A period of non-use by a farmer of his cooperative is, however, only a possible indication of the abandonment of that cooperative as a mechanism where he can get benefits through use. Baarda testified that a one year period of non-use is not proof of a change in a member's attitude and approach towards his cooperative from that of "user" to that of "investor". Introduced into evidence was the deposition of Elmer Ray Johnson, former supervisor of exempt organizations for the IRS, including the auditing of farmers' cooperatives in Iowa. Mr. Johnson agreed that in setting up a test to determine whether or not a member was a producer, a period of several years would be a better gauge than twelve months. At trial West Central introduced into evidence a number of circumstances which might cause a particular member to not show any business

done with West Central during any particular twelve month period, but nonetheless that member continue to be looking to West Central as their market for crops raised, and for their farm supplies. The IRS offered no testimony or evidence to refute the above.

The Trial Court counted as members only those who completed a sale of grain or purchase of supplies with West Central during its fiscal tax year 1974, giving exception only for those members who were precluded from such activity by sickness, disability or death.

The Trial Court found 2,418 members, or 83.7548% of the 2,887 holders of West Central's voting stock, to be producers marketing their products or purchasing their supplies through West Central during the twelve months constituting the 1974 tax year of West Central. West Central records introduced into evidence would

indicate that of the 469 members found by the Trial Court not to be current patrons, 290 had done business with West Central during its tax year 1973, and 87 had done business with West Central in both 1973 and 1975.

The Trial Court also refused to count as current patrons members who were storing grain with West Central during the 1974 year in question.

To West Central's contention that the time frame for determining whether a member is currently patronizing a cooperative need be determined with reference to the rationale for the requirement, and take into account "real world" modern farming practices, the Court of Appeals offered neither explanation nor analysis. The Court of Appeals responded only that "because tax exemptions must be narrowly construed, it is reasonable and consistent with the general scheme of the Internal

Revenue Code to assess annually the taxpayer's compliance with the terms of the exemption."

It is unclear from the decision of the Eighth Circuit whether the Court of Appeals found storing grain to constitute doing business on a current basis with West Central, the issue before the Court. The Eighth Circuit disposed of the matter by determining that storing grain with the cooperative is not "marketing or purchasing" through a cooperative, an issue not raised to the Court, and decided in a matter contrary to all case precedent and the IRS position under Section 521. West Central brought this to the attention of the Eighth Circuit in a Petition for Rehearing, which was denied without comment.

REASONS FOR GRANTING THE WRIT

West Central believes that the Writ should issue in this case for all of the following critical reasons:

1. In handling the issue of whether the storing of grain constitutes current business with the cooperative, the Court of Appeal's actions in failing to answer the issue before it, and disposing of the issue by erroneously deciding an issue neither briefed or argued to the Eighth Circuit, and failing to answer the matter when raised in a Petition for Rehearing, reflects such a departure from accepted and usual course of judicial procedure as necessitates the exercise of this Court's supervisory power.

2. In deciding that storing grain is not "marketing or purchasing" within the meaning of I.R.C. §521, the decision entered by the Eighth Circuit conflicts with the holdings of the Eighth Circuit itself,

decisions of other Courts of Appeals, and the position of the Internal Revenue Service, upsetting the basis of tax exemption for numerous cooperatives, all of which dictate the review and correction of such decision.

3. A determination that the measure for compliance with the judicially imposed requirement of "current patronage" when limited to the twelve months coinciding with the cooperative's tax year operates to take away a statutorily conferred benefit by placing an unreasonable standard upon cooperatives not contained in the statute nor contemplated by Congress, and indicates a lack of understanding the case and issues before it which results in a decision that must be reviewed by

this Court as the court of last resort.

4. Farmers are struggling for their very existence in many parts of the United States. The issues before the Court do not impact only upon West Central or its members. In the United States there were 2,933 farmers' exempt cooperatives (with sales of nearly $15 billion) filing as exempt under §521 of the Internal Revenue Code. (Statistics for the year 1977, the most recent information available on §521 cooperatives, as set out in an article by Roger Wissman, Agricultural Economist for Agricultural Cooperative Services, United States Department of Agriculture, and appearing in Farmer Cooperatives, July, 1984, published by Agricultural Coopera-

tive Services.) Related issues are before the United States Tax Court in Docket No. 15643-82 and Docket No. 5988-83, Farmers Co-operative Company, et al., v. Commissioner. The Eighth Circuit decision sought to be reviewed will have a consequence of national importance.

ARGUMENT

I.

THE TIME FRAME FOR DETERMINING WHETHER A SHAREHOLDER-PRODUCER IS SUFFICIENTLY PATRONIZING A COOPERATIVE SHOULD NOT BE LIMITED TO JUST BUSINESS TRANSACTED WITHIN THE TWELVE MONTHS CONSTITUTING THE TAX YEAR OF THE COOPERATIVE.

The tax treatment of cooperatives is set forth in Subchapter T, Sections 1381-1388, of the Internal Revenue Code of 1954, as amended. (All statutory references, unless otherwise noted, are to the

Internal Revenue Code of 1954, as amended ("I.R.C." or the "Code")). Subchapter T applies to two types of organizations: (1) farmer cooperatives described in Section 521 (so-called "exempt" cooperatives); and (2) any other corporation (with exceptions not pertinent here) operating on a cooperative basis (so-called "non-exempt" cooperatives). I.R.C. §1381(a)(1) & (2).

Exemption in this context is somewhat of a misnomer, because even "exempt" cooperatives are subject to the same normal tax, surtax and alternative tax imposed on corporations. I.R.C. §1381(b). All cooperatives, whether exempt or non-exempt, are entitled to deduct amounts paid or allocated to their patrons (called "patronage refunds or dividends") under certain circumstances. I.R.C. §1382(b). Exempt cooperatives are entitled to two additional deductions: (1) for amounts paid

as dividends on capital stock; and (2) for amounts paid out of earnings from non-patronage sources. I.R.C. §1382(c)(1) & (2).

In pertinent part, I.R.C. §521(b)(1) states that exempt cooperatives are "farmers' . . . associations organized and operated on a cooperative basis (A) for the purpose of marketing the products of members or other producers, and turning back to them the proceeds of sales, less the necessary marketing expenses, on the basis of either the quantity or the value of the products furnished by them, or (B) for the purpose of purchasing supplies and equipment for the use of members or other persons, and turning over such supplies and equipment to them at actual cost, plus necessary expenses."

Because West Central does have capital stock, I.R.C. 521(b)(2) becomes important. It states that the §521 exemption

"shall not be denied any such association because it has capital stock . . . if substantially all such stock . . . is owned by producers who market their products or purchase their supplies and equipment through the association." (Emphasis added).

West Central stock was held by farmer-producers in 1974. That was not questioned before the Trial Court. At issue is whether substantially all of the farmer-producers holding the voting stock of West Central were actively patronizing West Central. The first case to impose the additional requirement that producers holding stock be "active" with such cooperative was Cooperative Grain & Supply Co. v. Commissioner, 407 F.2d 1158 (8th Cir. 1969). The tax exempt status of the Roseland Cooperative was at issue. The Eighth Circuit in the Roseland case concluded that "substantially all of the

shareholder-producers are required to market their products and purchase their supplies through the taxpayer on a current basis. That is our holding." 407 F.2d at 1163. (Emphasis added).

West Central agrees with the Eighth Circuit's determination in Cooperative Grain & Supply Co. that substantially all of the shareholders of an exempt farmers' cooperative need be current patrons as well as producers. The current patronage requirement is a logical extension of the concerns of Congress in enacting the Revenue Act of 1926, which gave us the present language in question. Mimeo 3886, X-2 C.B. 164 (1931) of the IRS reviewed the enactment of the provisions in question, and indicates that the concern of Congress and of the Internal Revenue Service at that time was to restrict the benefits of the tax exemption to cooperatives owned by "actual producers", and to prohibit in-

vestors, non-producers, and shareholders ceasing to be producers from owning a substantial quantity of the voting stock of a tax exempt cooperative. X-2 C.B. at 167-168. In Cooperative Grain & Supply Co. the Eighth Circuit adopted the reasoning of the IRS in indicating that "if a producer owns stock in the cooperative but does not transact business through it, then he is no different from a nonproducing investor." 407 F.2d at 1159.

The rationale for "current patronage" being clear, it was left to the Eighth Circuit in the instant case to determine the time reference for determining "current patronage", left undecided by the Cooperative Grain & Supply Co. case. (The time frame issue had never previously been before an appellate court, though on remand the Tax Court in Cooperative Grain & Supply Co. assumed the Eighth Circuit had meant "actual yearly participation". 32

T.C.M. (CCH) 795, 798 (1973)). Without any analysis of the Cooperative Grain & Supply Co. case, or the legislative history, or why it had imposed the "current patronage" requirement in the first place, the Eighth Circuit panel decision disposed of the issue by concluding that ". . . it is reasonable and consistent with the general scheme of the Internal Revenue Code to assess annually (West Central's) compliance with the terms of the "Section 521" exemption."

West Central does not argue with what the "general scheme" of the Internal Revenue Code may or may not be. West Central would point out, however, that a measure of compliance looking at more than one year's activity is not unheard of in the Internal Revenue Code. (In determining whether an activity is engaged in for profit, if gross income exceeds deductions

for the activity in two or more of the taxable years in the period of five consecutive years ending with the taxable year in question, a presumption arises that the activity is engaged in for profit. I.R.C. §183.)

West Central does not dispute that the IRS can "annually check compliance" by West Central with the requirements of I.R.C. §521. Contrary to the government attorney arguing orally before the Eighth Circuit, a test encompassing more than twelve months activity would not prevent a timely audit of a cooperative. To audit the 1974 year of West Central, we would only be arguing that business of a member with West Central occurring in either 1973 or 1974 be examined. The information for both years would most certainly be available to the IRS upon audit.

West Central would urge that the proper test for determining what constitutes do-

ing business on a "current basis" should be determined in relation to why the additional requirement of a "current patronage" was added by the Eighth Circuit. The language of the statute itself does not demand that stock be owned by producers who market their products or purchase their supplies every year. The language of the statute was intended to make certain that it was farmers who marketed their products or purchased their supplies and equipment that were benefited by the tax exemption, rather than investors who are not actually farmers, and did not have their own products to sell or their own needs for supplies and equipment to fill, but were rather reselling or purchasing for resale.

The test for determining compliance with the statute should not be allowed to impose a standard much greater than ever envisioned by the Congress enacting the

law itself. A statutory interpretation is not reasonable unless it harmonizes with the plain language of the statute, its origins and purposes. Durbin Paper Stock Co., Inc., 80 T.C. 252,257 (1983), citing United States v. Vogel Fertilizer Co., 455 U.S. 16 (1982) and National Muffler Dealers Ass'n v. United States, 440 U.S. 472,477 (1979).

The Eighth Circuit in Cooperative Grain & Supply Co. correctly adopted the position that a person who has abandoned his cooperative as a user might raise the same concerns for manipulation of the cooperative as an investor or non-producer. If a member has abandoned the cooperative and has no plans to use it, then such member might vote in an attempt to make the cooperative operate in a different fashion with regard to pricing, or redemption of stock, that member at that point making decisions based upon his position as an

investor rather than upon the maximum amount of benefit that can be given to a producer through the cooperative. Extended periods of non-use serve as an indication that a member has abandoned the use of a cooperative as a producer.

Yes, most members do business with West Central every year. The statute as interpreted requires that substantially all of the stock be in the hands of producers doing business with West Central on a current basis. "Substantially all" has been interpreted to mean 85%. Rev. Rul. 73-248, 1973-1 C.B. 295. Because of this high standard of participation, it is important to realize that it is not unusual for a period of twelve consecutive months to occur in which a shareholder-patron does not do business with his cooperative, yet West Central continues to be the primary market or source of supplies for such member.

A grain farmer member of West Central may experience a crop failure, or may have signed up for the U.S. government farm program, and obtained crop loans rather than sell his crop during a particular twelve month period. A producer may choose not to sell to the cooperative in a particular twelve month period in expectation of higher prices later on, or for tax reasons. A member may store all of his grain on his farm, hold it over a period of a year, and then deliver more than one crop for sale during a particular West Central tax year. A livestock producer might feed all of their grain during a twelve month period, leaving no grain to be selling to West Central, or because of crop rotation not raise for sale a cash crop every year. How can West Central go to a member who sells grain to West Central, and tell them they can no longer be a member because even though they may have sold every bushel of

grain to West Central, they didn't sell any grain to West Central during a particular twelve month period of time? Is the farmer to sell at lower prices than he might otherwise anticipate receiving, to meet the artificial standards imposed by the Internal Revenue Service? All of these examples introduced at trial were undisputed by the IRS, and most certainly prove the undesirability of a twelve month test as a standard for measuring whether a member has abandoned his cooperative as a user.

It might be anticipated that in cooperatives dealing with perishable commodities, members as a rule would sell to their cooperative on an annual or even more often basis. West Central would not wish to be seen as indicating that for some types of cooperatives a twelve month patronage test might be appropriate, but would certainly wish to point out that a

yearly patronage requirement is most inappropriate with regard to grain cooperatives. Grain can be stored for long periods of time. Members of grain cooperatives do not have the urgent need for a guaranteed market as members raising a perishable commodity might. Marketing agreements between members and cooperatives have worked to some degree with regard to perishable commodity cooperatives. But, as testified to at trial, they have failed miserably, even resulting in the bankruptcy of cooperatives, where tried with grain cooperatives. Grain cooperatives, and their members, if they have a commodity to sell to their cooperative have it only once a year, such that it is not unusual at all for members in a grain cooperative to occasionally have a particular twelve month period coinciding with the tax year of the cooperative in which they do not patronize

such cooperative, even though such co-operative might get all of their business.

In a question during oral argument, a Justice of the Eighth Circuit indicated that the test would not be just measuring member sales to a cooperative, but that members' business could be buying from the cooperative as well. The Judge indicated he felt no particular burden was being imposed upon a cooperative through a twelve month test, stating it could be complied with simply by "farmers who are members going in there and buying groceries and other things." The problem with that is that West Central does not deal in consumer type goods which might be used at many different times during the year, a matter clear on the record. West Central deals strictly in farm supplies, of a nature that may only be purchased once every crop season. Weather may prevent a member from putting either the spring or

fall crop inputs on during the regular season, such that they end up doubling up crop inputs in one growing season, missing the cooperative's tax year though buying all of their inputs from the cooperative. Must he buy crop inputs at a time when they are not needed, or at a time when weather would prevent their use, in order to allow the cooperative to meet the artificial IRS standard?

The Internal Revenue Service does recognize exceptions from the annual business requirement where a cooperative deals in high priced items such as farm machinery which are not normally purchased on an annual basis. Rev. Proc. 73-39, 1973-2 C.B. 502. Remembering that the test is only being imposed to determine whether or not the member had abandoned his cooperative as a user, and that normal farming circumstances and practices can easily result in the patron's doing all of

his business with West Central but none of it happening to have been transacted within a particular twelve month period, the test for "current patronage" should not be so artificially compressed as the 8th Circuit decision would dictate.

Numerous concrete examples based upon the actual records of member business were introduced by West Central to attempt to show the ludicrous nature of a determination that a person not having a sale or purchase during a twelve month period was not an active patron of a cooperative, or concerned about their cooperative as a user rather than an investor. One member responded that while he chose not to market any of his grain during the period involved and stored it all on his farm, "West Central Coop has always had 100% of my grain business." Another member indicated the records didn't happen to show any activity from him, when measured by

the twelve month tax year of West Central, by explaining the sales of his crop occurred in January of 1973, and that his "tax year runs from December 31st", showing why his sales were not included in West Central's tax year 1974, which commenced February 1, 1973. As illustration, the following lists by year the business done with West Central by Imogene Hamilton, a member now deceased. In evidence was the fact that she had stored her grain during the year 1974, and as a result had no sales during February 1, 1973 to January 31, 1974. She was determined to be an "inactive patron" of West Central by the Trial Court. Can it be said she had abandoned her cooperative as a user, raising concern as to her receiving benefits of West Central's tax exemption, when her business done with West Central from 1971 through 1977 is as follows:

1971	Corn	5,169.03 Bu
1971	Soybeans	1,062.71 Bu
1971	Merchandise purchased	844.66 $
1972	Soybeans	1,404.39 Bu
1972	Corn	6,263.54 Bu
1972	Merchandise purchased	1,363.33 $
1973	Soybeans	1,063.00 Bu
1973	Corn	8,061.26 Bu
1973	Merchandise purchased	704.04 $
1975	Corn	3,100.88 Bu
1975	Soybeans	950.33 Bu
1976	Soybeans	305.11 Bu
1976	Corn	2,773.39 Bu
1977	Soybeans	1,193.55 Bu
1977	Corn	2,699.99 Bu
1977	Merchandise purchased	564.94 $

West Central respectfully reminded the Eighth Circuit that when it stated in Cooperative Grain & Supply Co. that there was "virtually no legal authority suggesting that (Section 521(b)(2)) requires a current patronage requirement", its only citation was to Legal Phases of Farmers' Cooperatives, FCS Bulletin 10, (1958), for support. 407 F.2d at 1160. The same 1958 edition quoted from by the Eighth Circuit also set out in suggested organizational

documents when a cooperative should move to redeem a shareholder-patron's stock for failure to currently patronize the co-operative. The length of time selected as indicative of an abandonment was two years. Id. at 56, 315-316. No mention is made of this in the 8th Circuit opinion West Central seeks to have reviewed. If Legal Phases of Farmers' Cooperatives was good enough to cite for its support of the notion of current patronage, it seems it should also be consulted for what period the cooperative should measure for current patronage. The 1976 edition of Legal Phases of Farmers' Cooperatives, FCS Information 100, (1976) has retained the two year period as the proper measure for current patronage. Id. at 564,568.

The Trial Court and the Eighth Circuit, depending upon little more than a recantation that special tax exemptions are to

be strictly construed against the taxpayer, have managed to totally frustrate what the courts in the era of enactment found to be the purpose of the forerunner to I.R.C. §521, namely to prevent a possible narrowing of exemptions for farmer cooperatives by administrative construction. Farmer's Cooperative Creamery v. Commissioner, 21 B.T.A. 265, 268 (1930). The IRS, now with the aid of the Trial Court and Eighth Circuit, is being allowed to promulgate a twelve month test that will not just weed out cooperatives whose tax exemption is benefiting investors and non-producers, but will eradicate from the countryside exempt farmers' cooperatives. The Supreme Court should not allow such misconstruction to become the rule of the land.

II

SHAREHOLDER-PATRONS STORING GRAIN WITH WEST CENTRAL DURING ITS TAX YEAR IN QUES-

TION ARE CURRENTLY PATRONIZING WEST CENTRAL WITHIN THE MEANING OF SECTION 521 OF THE INTERNAL REVENUE CODE.

Rev. Rul. 73-248, 1973-1 C.B. 295 interprets the "substantially all" language of I.R.C. §521(b)(2) to mean 85% of the voting stock must be owned by producers. It should be noted that the highest percentage previously found by a court not to constitute "substantially all" was 78% in Cooperative Grain & Supply Co. v. Commissioner, 32 T.C.M. (CCH) 795 (1973). But even assuming the validity of Rev. Rul. 73-248, and measuring current patronage on a twelve month basis coinciding with West Central's 1974 tax year as the Trial Court and Eighth Circuit would require, West Central Cooperative is only 36 producers short of satisfying the 85% test so stringently applied. And there were 39 shareholder-patrons not presently counted as active patrons who were storing grain with

West Central Cooperative during its entire tax year 1974.

At both the Trial and Appellate Court levels, West Central has argued that members storing grain with West Central are actively and currently doing business with West Central, and meet the "current patronage" requirement of Cooperative Grain & Supply Co.. It is unclear whether the Eighth Circuit panel decided whether storing grain was "current patronage" or not. The panel disposed of the issue by indicating that the "language at 26 U.S.C. Section 521(b)(2) is clear and storing grain with the cooperative is not marketing or purchasing through a cooperative." West Central respectfully asserts that in such disposition the Eighth Circuit has failed to answer the issue before the court (whether storage constitutes doing business on a current basis), and incorrectly decided an issue not argued (wheth-

er storage constitutes marketing or purchasing).

Permissable activities included in "marketing or purchasing" are important because not all farmer cooperatives can be exempt from taxation under I.R.C. §521. It is only those farmers' cooperatives organized and operated for the purpose of marketing the products of members or other producers, or for the purpose of purchasing supplies and equipment for the use of members or other persons that will be considered to be exempt. I.R.C. §521(b)(1). Contrary to what the 8th Circuit evidently believes, the terms "marketing or purchasing" within I.R.C. §521 are not so narrowly defined as being limited to solely the passage of title and contemporaneous payment for goods. The Eighth Circuit determination is directly contrary to the IRS position. "Revenue Ruling 66-108, 1966-1 C.B. 154, defines

the term "marketing" as used in Section 521 of the Code to include not only the sale of farm products by farmers' cooperative for its patrons but other activities necessary to the sale of such products. This definition is broad enough to include all activities which are an integral part of the marketing function. Therefore, a cooperative may be exempt under Section 521 of the Code without actually handling the sale of a product." Rev. Rul. 67-430, 1967-2 C.B. 220 (Emphasis added) (Found the formation of a cooperative to furnish facilities for a farmers' market to qualify the cooperative for tax exempt status under Section 521). In describing the activities encompassed under the "marketing" definition under Section 521, the Exempt Organization Handbook of the Internal Revenue Service at Chapter 44 (Item 32) states that "the marketing process includes activities such as processing,

packing, crating, shipping, storing, manufacturing, etc., when necessary in marketing agricultural products." (Emphasis added). A cooperative organized to buy or lease grazing land to apportion to its members for grazing their livestock was found to be furnishing its members "supplies" within the meaning of Section 521. Rev. Rul. 67-429, 1967-2 C.B. 218. All of the foregoing indicate that in order to qualify as an exempt cooperative an association does not need actually to be taking title to products of its members. The Eighth Circuit determination is contrary to all recognized decisions on the issue. See Pomeroy Cooperative Grain Co. v. Commissioner, 288 F.2d 326,329 (8th Cir. 1961) (Storage income allocated in patronage dividends); Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc., 497 F.2d 203,215 (9th Cir. 1974) and Farmers Cooperative Creamery Ass'n of

Cresco, Iowa v. United States, 81-1 U.S. Tax Cas. (CCH) ¶9457 (1981) at 87,322 (the term "marketing" far broader than the word "sell", definition of "marketing" includes the aggregate of functions involved in transferring title and in moving goods from producer to consumer, listing among others "storing").

At the risk of being redundant, West Central would wish to explain exactly what the recognized law was prior to the decision by the Eighth Circuit case with respect to what was "marketing or purchasing" within the meaning of Section 521. The foregoing authorities make it quite clear that a cooperative could have as its only business the storage of members' grain, and qualify as an exempt cooperative under Section 521. There is no dispute that these 39 members did have their grain being stored by West Central Cooperative. These 39 members when added

to the 2,418 members already found to be actively patronizing West Central would be enough for West Central to meet the standard imposed by the IRS in determining and confirming substantially all of its stock was held by producers. Yet the Eighth Circuit somehow found against West Central on the storage issue. West Central would respectfully pray that the Supreme Court would not allow a decision to stand which is in such conflict with recognized decisions of other courts, and even contrary to the position of the IRS.

It might make a difference if the business being done by the shareholder-patron with West Central was "incidental income", which is income derived from sources not directly related to the marketing, purchasing, or service activities of the cooperative association. Treas. Reg. §1.522-2(d) (1958). Examples of incidental income are interest earned, in-

come from investments in securities, and income from the sale or exchange of capital assets. (Id). These would all be examples of income which could not serve as a basis for a patronage refund or dividend being paid, because such income was not derived from business done with members.

Income received from members for storing their grain is not "incidental income". Patronage dividends can be separately paid on storage charges. Rev. Rul. 59-107, 1959-1 C.B. 20. If a cooperative can pay "patronage dividends" on storing grain, it certainly constitutes "current patronage" or doing business with the cooperative during the time the members are storing the grain with the cooperative. For West Central the margins or profits earned from storage income are combined with the margins or profits earned upon the sale of grain, with a patronage re-

fund, if any, being a combination of the two margins or profits. West Central's treatment reinforces more so the fact that storing grain is an integral part of the marketing function of cooperatives. "Where the taxpayer's grain business is an integrated business, that is, the same storage and facilities are used by the taxpayer in its marketing and storage facilites, and patrons are credited with the number of bushels of grain delivered without regard to whether they are for sale or for storage, the storage and marketing activities may be treated as a unit." Rev. Rul. 63-58, 1963-1 C.B. 109. See Pomeroy Cooperative Grain Co. v. Commissioner, supra. Storing grain most certainly constitutes "current business" with the cooperative for purposes of the Cooperative Grain & Supply Co. test and Section 521.

It is most important to remember again that the "current patronage" requirement

is not and should not be in terms of whether or not a patron receives a "patronage dividend or refund" for his business with the cooperative, which may have been what is confusing the Eighth Circuit panel. The purpose of a cooperative is to increase the bargaining position of its individual patron-members, resulting in decreased costs of inputs and increased prices for commodities sold. Whether a cooperative can declare a patronage dividend or refund is dependent upon whether the cooperative earns margins for a particular year, that being simply receipts in excess of its expenditures. That cooperatives quite often are facing operating losses in the Midwest in these troubled agricultural times most certainly does not mean that they are not fulfilling the purpose for their formation.

The "current patronage" requirement of Cooperative Grain & Supply Co. is nothing

more than a requirement that shareholder-patrons need be doing business with a cooperative. In reviewing the current patronage requirement imposed by Cooperative Grain & Supply Co., the IRS determined that "it is the position of the service that current patronage means a continuing ongoing relationship between the producer and the cooperative." Rev. Proc. 73-39, supra. The 39 people storing grain with West Central during the tax year in question most certainly had a continuing and ongoing relationship with West Central. How can West Central go to one of its members who has grain stored with it, and tell them that they are not "doing business currently" with the cooperative, and that West Central will have to redeem their stock, so that they have no voice in the policies of West Central, even though they presently have grain stored with West Central?

Shareholder-patrons storing grain with West Central allay the rightful concerns expressed by the Cooperative Grain & Supply Co. case in requiring current patronage to make certain that substantially all of the stock of the cooperative was held by shareholders using the cooperative to produce, rather than looking at the cooperative as an investment. Storing grain constitutes current patronage. It constitutes active business. Convincing testimony was offered at trial to refute the "straw man argument" that there is no way of knowing whether the person storing the grain and holding the warehouse receipt later sold the grain to West Central. If the tax exempt status of West Central Cooperative hinges on whether the 39 persons who had grain stored with West Central in 1974 as evidenced by their warehouse receipts ended up selling such grain to West Central, then West Central

would respectfully request remand of the case to district court for an opportunity to put into evidence that every bushel of grain on warehouse receipt by such 39 members was subsequently sold by these same 39 members to West Central Cooperative.

West Central fully appreciates the burdens being placed upon and the time constraints of the Supreme Court. But, our legal system was designed with the hope of dispensing justice. Justice has not been accorded West Central Cooperative or its members in this case. We believe that the members of this Court could not feel right in permitting the lower courts' decisions to stand.

CONCLUSION

West Central was told by the IRS auditor performing the examination which resulted in revoking its exempt status that the method by which the IRS measured com-

pliance with the current patronage rule wasn't a very sensible rule, but it was "the law". West Central was told by the supervisor of exempt organizations for the IRS that a period of several years would be a better gauge than twelve months in determining who is a current producer. West Central has been told that unfortunately for it "the law" has not kept pace with the modern farming and cooperative practices of its members and itself, and that was the reason why West Central was finding it difficult to comply with the IRS audit and examination. This is not the case.

The "current patronage" requirement imposed by the Eighth Circuit in the Co-operative Grain & Supply Co. case is not found in the statute itself. But, West Central had no quarrel with the Eighth Circuit when it added that requirement, because it believes as well that a co-operative should be controlled by the mem-

bers it currently serves. But the decision of the Eighth Circuit now has imposed a standard which squares neither with the statute nor its intent. How can it be said that there is concern for the holding of stock by a member because he has abandoned the cooperative, and thinks like an investor, when he is currently storing grain with the cooperative as a user?

Unless reviewed, the Eighth Circuit will be allowed to have taken six months to enter a per curium decision, reciting therein conclusions without analysis, leaving issues undecided, and making determinations which fly in the face of its own previous cases and those of other Circuits, and end up taking a position which cannot even be squared with those espoused by the IRS.

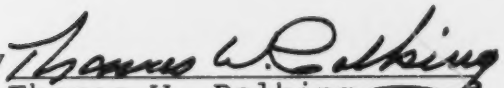
A party before a tribunal cannot expect the judge or court to always be right. But, the party should have the right to

feel that the judges and the courts will listen to the issues before them, and before entering a decision understand the issues and the impact upon the parties of their decisions. The party should have the right to a degree of consideration and logic in the entering of judgment. West Central was not afforded that right in this case.

Respectfully submitted,

WEST CENTRAL COOPERATIVE,
Petitioners

WILCOX, POLKING, GERKEN
& SCHWARZKOPF, P.C.

By 
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Counsel for Petitioners

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 84-1289

West Central Cooperative,	*	
Appellant,	*	Appeal from the United States District Court
v.	*	for the Northern District of Iowa
United States,	*	
Appellee.	*	

Submitted: October 10, 1984

Filed: April 1, 1985

Before LAY, Chief Judge, ROSS and McMILLIAN, Circuit Judges.

PER CURIAM.

West Central Cooperative (taxpayer) appeals from a final judgment entered in the District Court[1] for the Northern Dis-

[1]The Honorable Edward J. McManus, Chief Judge, United States District Court for the Northern District of Iowa.

trict of Iowa denying taxpayer's petition seeking a refund of additional taxes assessed because of the withdrawal of taxpayer's exemption as a farmers' cooperative pursuant to 26 U.S.C. § 521(b)(2) (1982). For reversal taxpayer argues that the district court erred in (1) holding that the percentage of taxpayer's voting stock held by producers did not constitute "substantially all" within the meaning of 26 U.S.C. § 521(b)(2), (2) imposing an annual patronage test in determining whether substantially all voting stock was owned by participating producers, (3) not including as participating members those who merely stored grain in taxpayer's storage facilities, and (4) approving retroactive revocation of taxpayer's exemption. For the reasons discussed below, we affirm.

The basic fact in the present case are not in dispute. Taxpayer is a capital

stock marketing and purchasing farmers' cooperative organization with its principal place of business in Ralston, Carroll County, Iowa. Taxpayer purchases grain from its members and sells it to grain buyers on the open market. Taxpayer also purchases farm supplies such as livestock feed, fertilizer, pesticides, and seed to resell to its members. In addition, taxpayer owns and operates grain storage facilities as a federally licensed warehouse.

Taxpayer issued voting common stock limited to one share per member. Shareholder could earn patronage dividends based on the quantity of goods that the shareholder sells through or purchases from the cooperative in a given year. Dividends are not distributed on the basis of the collective success of the cooperative and only participating members who market their products through or purchase

supplies from the cooperative in a year are entitled to a dividend. As of January 31, 1974, the last day of the taxpayer's fiscal year, taxpayer had 2,887 shares of voting common stock outstanding. According to taxpayer's records, 83.75% of the stockholders were producers who marketed some of their products through or purchased supplies from taxpayer and thus were eligible to receive patronage dividends.

In May 1958 the Internal Revenue Service (IRS) issued a letter recognizing that the taxpayer was an exempt farmers' cooperative pursuant to 26 U.S.C. § 521. After an audit of taxpayer's 1974 fiscal year, the IRS determined that substantially all of taxpayer's common stock was not owned by producers who marketed through and purchased from the taxpayer. Therefore, on January 23, 1978, the IRS

withdrew taxpayer's tax exemption ruling, effective for its 1974 fiscal year and all subsequent years. Taxpayer was assessed $57,459.00 for additional income taxes, including interest and penalty, all of which taxpayer has paid. Taxpayer's claim for a refund was denied by the Commissioner; thereupon taxpayer instituted this refund suit against the government.

In pertinent part 26 U.S.C. § 521(b)(2) provides that an "[e]xemption shall not be denied any such association because it has capital stock . . . if substantially all such stock . . . is owned by producers who market their products or purchase their supplies and equipment through the association." The district court correctly noted that special tax exemptions are to be strictly construed against the taxpayer. West Central Cooperative v. United States, No. 1C 81-3029, slip op. at 3 (N.D. Iowa Dec. 21, 1983), citing Helvering v.

Northwest Steel Rolling Mills, Inc., 311 U.S. 46 (1940). Accord Land O'Lakes, Inc. v. United States, 514 F.2d 134, 139 (8th Cir.), cert. denied, 423 U.S. 926 (1975).

Taxpayer argues that the district court erred in holding that substantially all of taxpayer's stock was not owned by producers who marketed or purchased through the cooperative. Rev. Rul. 73-248, 1973-2 C.B. 295 requires that at least 85% of capital stock must be held by producers before the "substantially all" test of 26 U.S.C. § 521(b)(2) can be satisfied. The district court held that "Rev. Rul. 73-248, 1973-2 C.B. 295 . . . is reasonable and in keeping with the congressional mandate embodied in the language of § 521(b)(2)." West Central Cooperative v. United States, slip op. at 5 (footnote omitted). We agree with the district court's conclusion that Rev. Ruling 73-248 reasonably interprets the "substantially

all" requirement and therefore, based on the 85% test, taxpayer did not qualify for the exemption.

Taxpayer also argues that the district court erred in imposing an annual patronage test in determining whether voting stock of a taxpayer was owned by producers.

This court held that "substantially all of the shareholder-producers are required to market their products and purchase their supplies through the taxpayer on a current basis." Cooperative Grain & Supply Co. v. Commissioner, 407 F.2d 1158, 1164 (8th Cir. 1969). On remand the Tax Court interpreted this to mean "actual yearly participation." Cooperative Grain & Supply Co. v. Commissioner, 32 T.C.M. (CCH) 795, 798 (1973). Accordingly, in the present case the district court held that taxpayer "failed to prove by a preponderance of the evidence that substan-

tially all of its voting stock was owned by producers who marketed their products or purchased their supplies and equipment through the cooperative on a current basis." West Central Cooperative v. United States, slip op. at 3 (footnote omitted). Because tax exemptions must be narrowly construed, it is reasonable and consistent with the general scheme of the Internal Revenue Code to assess annually the taxpayer's compliance with the terms of the exemptions.

Taxpayer also argues that the district court erred in not including as participating members those who merely stored grain in taxpayer's storage facilities but marketed no products nor purchased any supplies from the taxpayer. Relying on the unequivocal language in Co-operative Grain & Supply Co. v. Commissioner, 407 F.2d at 1162, the district court did not include as producers those who only stored

grain with the taxpayer. West Central Cooperative v. United States, slip op. at 3-4 n.2. We agree that the language of 26 U.S.C. § 521(b)(2) is clear and storing grain with a cooperative is not marketing or purchasing through a cooperative.

Finally, taxpayer argues that the district court erred in finding that retroactive revocation of taxpayer's exemption was not an abuse of discretion. Pursuant to 26 U.S.C. § 7805(b), the Commissioner has the power to revoke retroactively an exemption ruling. Absent an abuse of discretion, the Commissioner's determination will not be overturned. See Stevens Bros. Foundation, Inc. v. Commissioner, 324 F.2d 633, 641 (8th Cir. 1963), cert. denied, 376 U.S. 969 (1964). The district court correctly determined that taxpayer failed to prove that retroactive revocation in the present case was an abuse of discretion. Furthermore, publication of

Rev. Rul. 73-248 provided taxpayer with sufficient notice that 85% patronage was necessary to comply with 26 U.S.C. § 521(b)(2).

We have carefully examined the record and find no error of law or fact on the part of the district court. Accordingly, we affirm on the basis of the district court's opinion. See 8th Cir. R. 14.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

122183PB

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

WEST CENTRAL
COOPERATIVE,

Plaintiff,

vs.

UNITED STATES
OF AMERICA,

Defendant.

This action for refund of income taxes and interest was tried to the court on July 18, 1983. All proposed findings of fact and conclusions of law have been received and considered along with the entire record and the court now makes the following:

FINDINGS OF FACT

1. Plaintiff is a capital stock marketing and purchasing farmers' cooperative organization with its principal place of business in Ralston, Carroll County,

Iowa.

2. At all times material plaintiff was a fiscal year taxpayer engaged in the purchase of grain, including corn and beans, from its members and sale to grain buyers. It also purchases farm supplies such as livestock feed, fertilizer, herbicides, pesticides, and seed which it sells to its members. Plaintiff owns and operates grain storage facilities as a federally licensed warehouse under 7 USC § 241.

3. Prior to its fiscal year ending January 31, 1974 (FY 74), the Internal Revenue Service (IRS) recognized plaintiff as an exempt farmers' cooperative under 26 USC 521(b)(2).

4. During FY 74 plaintiff had outstanding 2,887[1/] shares of voting common stock limited to one share per member.

1/ Duplicate accounts for 3 members have been deleted.

5. During said fiscal year 2,418 members or 83.75% of the holders of plaintiff's voting stock were producers who marketed some of their products or purchased some of their supplies and equipment through plaintiff.

6. Prior to FY 74, plaintiff had the capability and did in fact review its membership's business activity on an annual basis. However, during FY 74 it failed to review the business activity of its members to determine current patronage.

7. On January 23, 1978, plaintiff's tax exemption under 26 USC 521(b)(2) for FY 74 was withdrawn by IRS. In 1978 and early 1979, defendant assessed the plaintiff for additional income taxes for FY 74 in the total amount of $57,459.00, including interest and penalty which has been paid. More than six months have passed since plaintiff filed a valid and

timely claim for refund.

CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and the subject matter pursuant to 28 USC 1346(a)(1) and 26 USC 7422(a).

2. In an action for refund of income taxes, the burden is on the taxpayer to prove that the assessment is wrong and the amount he is entitled to recover. Lewis v. Reynolds, 284 U.S. 281 (1932). It is not enough for the taxpayer to demonstrate that the assessment of tax for which refund is sought is erroneous in some respects. United States v. Janis, 428 U.S. 433, 440 (1976).

3. Special tax exemptions are to be strictly construed against the taxpayer. Helvering v. Northwest Steel Rolling Mills, Inc., 311 U.S. 46 (1940); Luehrmann's Estate v. Commissioner of Internal Revenue, 287 F.2d 10 (8th Cir. 1961).

4. The provisions of 26 USC 521 impose

strict requirements on cooperatives which must be satisfied in order for the cooperative to qualify for tax exemption. Farmers Union Co-op of Guide Rock v. Commissioner of Internal Revenue, 90 F.2d 488, 493 (8th Cir. 1937); Producers Creamery Co. v. United States, 55 F.2d 104, 106 (5th Cir. 1932).

5. Plaintiff has failed to prove by a preponderance of the evidence that substantially all of its voting stock was owned by producers who marketed their products or purchased their supplies and equipment through the cooperative on a current basis.[2/] 26 USC 521(b)(2); Co-

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2/

Here and in connection with Finding of Fact No. 5 supra, since plaintiff claims that the 50% of production or purchases standard required by Rev. Proc. 73-39, 1973-1 C.B. 502 is unreasonable, the court has included in the number of active members any shareholder-producer that did "some" business with plaintiff during FY 74. In addition, the court has included those members doing business through an agent and those members who

were precluded from current patronage by sickness, disability or death. This determination is in keeping with the exceptions to the current patronage requirement recognized by the Eighth Circuit in Cooperative Grain & Supply Co. v. Commissioner of Internal Revenue, 407 F.2d 1158, 1164 (8th Cir. 1969) and subsequently applied by the Tax Court in Cooperative Grain & Supply Co. v. Commissioner, 32 TCM (CCH) 795 (1973) on remand.

The court has not included those members who sold no grain; stored their grain on farm; stored their grain with plaintiff; or fed all their grain based on the following rationale from the Eighth Circuit:

> [3] The pertinent part of the statute under consideration recites in plain and unequivocal language that substantially all of the voting stock must be owned by producers "who market their products or purchase their supplies and equipment through the association." There are no exceptions, as we read the crucial phrase we are unable to discern any intent on the part of Congress to grant a cooperative exempt status if its stockholding producers market their products or purchase their supplies through the association only at such times as the producers may determine that it is expedient for them to do so. If Congress had not intended to impose a patronage requirement upon the stockholder-producers there would have been no reason to include in the statute the language under scrutiny. Congress in the enactment of a statute is presumed to have used no superfluous words. Tabor v. Ulloa, 323 F.2d 823 (9th Cir. 1963); Born v. Allen, 110 U.S.App.D.C. 217, 291 F.2d 345 (1960). Cooperative Grain & Supply Co., 407 F.2d at 1162.

operative Grain & Supply Co. v. Commissioner of Internal Revenue, 407 F.2d 1158, 1164 (8th Cir. 1969); Cooperative Grain & Supply Co. v. Commissioner, 32 TCM (CCH) 795, 798 (1973).

6. Rev. Rul. 73-248, 1973-2 C.B. 295 requiring that at least 85% or more constitutes "substantially all" of a cooperative's voting stock is reasonable and in keeping with the congressional mandate embodied in the language of § 521(b)(2).3/

2/ (Cont'd)

Nor has the court included those members who did business with plaintiff in six out of seven years. This argument was previously raised before the Tax Court and rejected on the following basis:

> A mere continuing business relationship without the actual yearly participation is not a sufficient basis upon which to find current shareholder participation of business with a cooperative. Cooperative Grain & Supply Co., 32 TCM (CCH) at 798.

3/

Rev. Rul. 73-248, the 85% requirement, was promulgated in light of various court opinions interpreting the "substantially all" language of § 521(b)(2). The lowest amount held by a court to constitute substantially all is 91%. Farmers Cooperative Creamery v. Commissioner, 21 BTA 265

United States v. Correll, 389 U.S. 299, 307 (1967).

7. Defendant's retroactive revocation of plaintiff's exemption was not an abuse of discretion. Stevens Bros. Foundation, Inc. v. Commissioner of Internal Revenue, 324 F.2d 633, 641 (8th Cir. 1963), citing Automobile Club of Mich. v. Commissioner, 353 U.S. 180 (1957).

It is therefore

ORDERED

Dismissed.

December 21, 1983.

Edward J. McManus, Chief Judge

UNITED STATES DISTRICT COURT

3/ (Cont'd)
(1930). The highest percentage held not to constitute substantially all is 78%. Cooperative Grain & Supply Co. v. Commissioner, 32 TCM (CCH) 795 (1973). It appears necessary for the Service to establish some guidelines and the 85% standard is a reasonable construction of the phrase.

JUDGMENT ON DECISION BY THE COURT

United States District Court
for the
NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

WEST CENTRAL COOPERATIVE, Plaintiff, vs. UNITED STATES OF AMERICA, Defendant.	Civil Action Docket No. 1C 81-3029 JUDGMENT

This action came on for trial before the Court, United States District Judge Edward J. McManus presiding. The issues having been duly tried and a decision having been duly rendered, it is ordered and adjudged that the plaintiff take nothing, that the action be dismissed on the merits and that the defendant, United States of America, recover of the plaintiff, West Central Cooperative, its costs of action.

Dated at Cedar Rapids, Iowa

Date: December 21, 1983

Chief Deputy Clerk
of Court

APPENDIX C

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 84-1269-NI	* September Term, 1984
WEST CENTRAL COOPERATIVE,	*
Appellant,	* Appeal from the United States District Court for the Northern District of Iowa
vs.	*
UNITED STATES,	*
Appellee.	*

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

May 16, 1985

Supreme Court, U.S.
FILED
OCT 11
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-242

In the Supreme Court of the United States

OCTOBER TERM, 1985

WEST CENTRAL COOPERATIVE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-242

WEST CENTRAL COOPERATIVE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the court of appeals' holding that it did not qualify as a tax-exempt farmers' cooperative during its 1974 fiscal year because it failed to satisfy the statutory requirement that substantially all of its stock be owned by producers who marketed their products through or purchased their supplies from it.

1. Petitioner is a capital stock marketing and purchasing farmers' cooperative. It purchases grain from its members and sells the grain to buyers on the open market. It also purchases farm supplies and equipment for resale to its members. In addition, petitioner owns and operates grain storage facilities as a federally licensed warehouse. Pet. App. 54-55.

Petitioner's members each receive one share of stock. Members earn patronage dividends based on the quantity of goods that they sell through or purchase from petitioner

in a given year (Pet. App. 55). According to petitioner's records, 83.75% of its stock was owned during its 1974 fiscal year by members who marketed products through or purchased supplies from it, and those shareholders were the only ones who were eligible to receive patronage dividends (*id.* at 56). Patronage dividends were not paid to members who transacted no business with petitioner during 1974 but merely stored their grain in petitioner's warehouse (see *id.* at 55-56).

Section 521 of the Internal Revenue Code[1] provides a tax exemption for certain farmers' cooperatives. A cooperative association having capital stock can qualify for this exemption only if "substantially all such stock * * * is owned by producers who market their products or purchase their supplies and equipment through the association" (I.R.C. § 521(b)(2)). The Commissioner for many years has interpreted the words "substantially all" as used in Section 521(b)(2) to mean 85% or more. *E.g.*, Rev. Rul. 73-248, 1973-1 C.B. 295.

Petitioner was first recognized as an exempt farmers' cooperative in 1958. Upon audit of petitioner's 1974 tax year, however, the Commissioner determined that it no longer qualified for exemption because only 83.75% of its stock was owned by producers who had marketed their products or purchased their supplies from it during that period. The Commissioner accordingly withdrew petitioner's exemption and asserted a tax deficiency in the amount of $57,000. Pet. App. 56-57.

Petitioner paid the asserted deficiency and, following the denial of its administrative claim for refund, brought this refund suit in the United States District Court for the

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[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as in effect for the tax year at issue (the Code or I.R.C.).

Northern District of Iowa. The district court sustained the Commissioner's position (Pet. App. 63-72) and the Eighth Circuit affirmed in a per curiam decision. It held that the Commissioner's interpretation of "substantially all" to mean 85% or more was "reasonable" and "in keeping with the congressional mandate" (*id.* at 58). And it noted that, according to petitioner's own records, only 83.75% of its stock was owned by qualifying members during its 1974 tax year. The court rejected petitioner's argument that stock owned by members who merely stored grain in its warehouse should be counted toward the 85% test, holding that "the language of [Section] 521(b)(2) is clear and storing grain with a cooperative is not marketing or purchasing through a cooperative" (Pet. App. 61).

2. While appearing to concede the validity of the 85% test (Pet. 37), petitioner principally contends (*id.* at 16-36) that the courts below erroneously failed to consider business that its members transacted with it in years other than 1974 in ascertaining whether it satisfied that requirement. The question for decision, however, was whether petitioner qualified for tax exemption during its 1974 tax year. It is well established that the federal income tax system is based on the principle of annual accounting. *Heiner* v. *Mellon*, 304 U.S. 271, 275 (1938); *Burnet* v. *Sanford & Brooks Co.*, 282 U.S. 359, 365-366 (1931). In what petitioner concedes (Pet. 21-22) to be the only other appellate decision precisely on point, the Eighth Circuit has previously held that, in determining whether the "substantially all" test of Section 521(b)(2) is satisfied, it is proper to consider only stock owned by members who market through or purchase from the cooperative "on a current basis." *Co-operative Grain & Supply Co.* v. *Commissioner*, 407 F.2d 1158, 1164 (8th Cir. 1969). On remand of that case, the Tax Court construed "on a current basis" to require "actual yearly participation" (32 T.C.M. (CCH) 795, 798 (1973)), and the Eighth Circuit

below approved that construction of its earlier decision (Pet. App. 59-60).

Because only 83.75% of petitioner's stock was owned by members who actually purchased or sold goods through it during 1974, the courts below correctly held, in accordance with the annual accounting principle, that "substantially all" of petitioner's stock was not owned by qualifying members and hence that it was not entitled to a tax exemption in 1974. Petitioner does not allege, nor is there, a conflict among the circuits on this question. Indeed, petitioner's argument boils down to a contention (see Pet. 19-22) that the panel below misinterpreted the Eighth Circuit's prior decision.

3. Petitioner alternatively contends (Pet. 36-49) that, even if the courts below were correct in focusing exclusively on its members' activities in 1974, stock owned by members who merely stored grain in its warehouse should be counted in determining whether it passed the 85% test. Section 521(b)(2), however, provides in pertinent part that substantially all of the cooperative's stock must be owned by members "who market their products * * * through the association." As the court of appeals correctly held (Pet. App. 61), the mere act of storing grain, without more, does not amount to "marketing." Indeed, petitioner in implementing its patronage dividend policy itself acknowledged that storing grain does not amount to marketing, since farmers who merely stored grain with it were not eligible to receive patronage dividends (Pet. App. 55-56).

Petitioner's theory, moreover, if accepted, would defeat Congress's intention in enacting the statute. If mere storage of grain were considered "marketing" for purposes of Section 521(b)(2), the statute's "substantially all" requirement would be eviscerated, since any cooperative could ensure its qualification for tax-exempt status simply by having 85% of

its members perpetually store a minimal amount of grain in its warehouse. It would then make no difference whether *any* of its shareholders actually sold their products through or purchased their equipment and supplies from the cooperative (I.R.C. § 521(b)(2)). There are, of course, agricultural cooperatives that operate for the sole or principal purpose of storing their members' grain. See, *e.g.*, *Pomeroy Cooperative Grain Co.* v. *Commissioner*, 288 F.2d 326 (8th Cir. 1961). Such organizations, however, cannot qualify as "exempt farmers' cooperatives" under Section 521(b)(2), but are subject to a limited form of taxation as non-exempt cooperatives under Sections 1381-1383 of the Code, which prescribe the tax treatment of cooperatives generally.[2]

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[2]Contrary to petitioner's contention (Pet. 39-42), there is no authority for the proposition that the mere storage of grain at a cooperative, without more, constitutes the "market[ing of] products * * * through the association" within the meaning of Section 521(b)(2). Petitioner's reliance (Pet. 41) on *Pomeroy Cooperative Grain Co.* v. *Commissioner, supra*, is misplaced; that case involved a non-exempt cooperative, and thus no question concerning the construction of Section 521 was presented. As petitioner notes (Pet. 40, 41-42), numerous cases and revenue rulings have defined "marketing" as an aggregate of functions, including storage, involved in transferring title and moving goods from the producer to the customer. *E.g.*, *Treasure Valley Potato Bargaining Ass'n* v. *Ore-Ida Foods, Inc.*, 497 F.2d 203, 215 (9th Cir. 1974); Rev. Rul. 67-430, 1967-2 C.B. 220. These authorities, however, simply stand for the common-sense proposition that storage is a necessary adjunct of the sale of goods in which a marketing cooperative may permissibly engage; none holds or even suggests that the long-term storage of grain, without more, amounts to "marketing" for purposes of Section 521(b)(2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Acting Solicitor General

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